INTERIM DECISION

This Board of Inquiry has been constituted (Exhibit No. 1) to deal with two Complaints alleging violations of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended (hereinafter called the "Code") (Exhibits No. 2 and No. 3) of S.S. Benet, of Mississauga, Ontario. The hearing commenced August 28, 1980 and has continued to this point in time, with adjournments from time to time, with some eleven days of hearing. At the hearing January 16, several motions were made in respect of subpoenae and after hearing argument, I reserved my decision dealing with such motions and issues.

There are three subpoenae to consider, first, that of the Commission directed to Mr. R.D. Merer (hereafter called the "Merer subpoena"), second, that of the Respondents directed to two Human Rights' Commission officers, Ms. Fern Gaspar, an Investigating Officer, and Mr. James Stratton, Director of Conciliation and Compliance, (hereafter called the "Stratton and Gaspar subpoenae") and third, that of the Respondents directed to Ms. Anne Molloy, an independent legal counsel retained by the Commission to give it advice in respect of the complaints at hand (hereafter called the "Molloy subpoena"). The issues in respect of the Molloy subpoena were not argued until May 12, 1981.

Counsel for the Respondents seeks an order to quash the subpoena issued at the request of the Commission and Complainant, and vice-versa. I have reviewed at length the voluminous material submitted by counsel in argument.

The Merer Subpoena

The question of a disputed subpoena had first arisen at the hearing December 23, 1980 (Transcript, pp. 1241-1255). Apparently, counsel for the Commission and Complainant caused a subpoena duces tecum (Transcript, p. 1408), which incorporated a list of specific documents, the "Merer Subpoena", to be served in August, 1980, upon Mr. R.D. Merer, one of the Respondents and the chief executive officer of the corporate Respondent. Counsel for the

INTERIM DECISION

THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1970, Chapter 318, as amended

IN THE MATTER OF: The complaints of S.S. Benet, of Mississauga, Ontario, Against R.D. Merer, A.V. Colledge of Toronto, Ontario, and GEC Canada Limited.

BEFORE: Professor Peter A. Cumming, Board of Inquiry.

DATES: August 28, 29, December 2, 4, 20, 22, 23, 1980, January 15, 16, March 2, May 12, 1981.

PLACE: Toronto, Ontario.

APPEARANCES: Messrs. Allen Millward and D.A.J. D'Oliveira, Counsel for Ontario Human Rights Commission, Messrs. E.A. Jupp, Q.C. and A.D. McAlpine, Q.C., Counsel for Respondents.

Commission put his reasons for the subpoena on December 23 as:

> "...[I]t is our wish that some of the documents as contained in that list be produced for our inspection and possible use in respect of the examination of witnesses to be called by the Respondent."
>
> (Transcript, p. 1242; see also Transcript at p. 1383).

However, Counsel for the Commission had also written to Mr. McAlpine August 6, 1980 in which he stated:

> "We confirm that these requests were not made as part of the discovery process but rather in pursuance of the subpoena provisions of the Statutory Powers Procedure Act. As the undersigned advise, our requests were made at this stage in an attempt to expedite matters and to obviate the necessity for an adjournment of the hearing to permit the examination of the documents requested."
>
> (Transcript, pp. 1247, 1248).

There was uncertainty initially in my mind as to whether Commission counsel was seeking to utilize the Merer subpoena as simply a discovery device, rather than as a subpoena to produce documents in evidence at the Inquiry as contemplated by s. 12(1)(b) of the Statutory Powers Procedure Act. After argument on this issue, it is now clear that the Merer subpoena is for the purpose of all the documents specified therein being tendered as evidence subject only to the determination by the Tribunal of issues as to relevance and privilege that may be raised (Transcript, pp. 1396, 1397).

Counsel for the Respondents, Mr. Jupp, stated on December 23 that he would produce those documents "that the Respondents intend to produce "at least forty-eight hours before the Respondents' case commences, and second, this approach would not include some documents in respect of which he would be asking for such evidence to be given in camera (Transcript, p. 1243).

I then suggested as there was to be an adjournment at that point in time in all events, that counsel try to resolve the matter between themselves during the adjournment and all counsel favoured this approach (Transcript, pp. 1245, 1252, 1253). They were unable to do so. Accordingly, on the resumption of the hearing January 16, 1981, the several issues in respect of the subpoenae again arose, and argument was then heard.

Mr. Jupp argued first, that neither the Ontario Human Rights Code nor the Statutory Powers Procedure Act, 1971 S.O. c. 47, provide any right of discovery, and second, that Commission counsel's only recourse was to obtain a fresh subpoena and call Mr. Merer as his witness. (Transcript, p. 1246).

The Code does provide in s. 14(2)(b) certain powers whereby the "Commission or an officer of the Commission may ... require the production for inspection and examination of employment applications, payrolls, records, documents, writings and papers that are or may be relevant to the investigation of the complaint". Section 14(5) of the Code provides that:

> "No person shall hinder, obstruct, molest or interfere with the Commission or an officer of the Commission in the exercise of a power or the performance of a duty under this Act or withhold from it or him any employment application, payrolls, records, documents, writings or papers that are or may be relevant to the investigation of a complaint."

However, it would appear that this means of obtaining production for discovery does not survive the inquiry stage, that is, that point in time when the Commission concludes a settlement cannot be achieved, and recommends to the Minister whether or not a board of inquiry should be appointed, as referred to in s. 14 (a)(1) of the Code. As the Code contemplates two distinct stages to the Complaint process, an inquiry and conciliation stage (s. 14(1)) and a Board of Inquiry stage (s. 14a(1)), and the right of discovery as contemplated by s. 14(2)(b) refers only to the "inquiry" stage, the legislature seems to have limited production for discovery purposes in respect of human rights complaints to only the inquiry stage as set forth in the Code. Section 12(1)(b) of the Statutory Powers Procedure Act, only allows

a subpoena duces tecum to require a person "to produce in evidence" the documents specified in the subpoena. See the Board of Inquiry decision in Guru v. McMaster University, November 12, 1980, at pp. 4,5.

As an aside, I mention this may have the unintended but unavoidable consequence of allowing an adjournment at the hearing, as allowed by s. 21, given the production of documents in evidence that come as a surprise to the party causing the subpoena to be given.

Mr. Jupp also raised what he termed "a picayune objection", arguing the then existing subpoena was defective as it is required by the Statutory Powers Procedure Act to be in "form 1", and form 1 in turn includes a passage, omitted from the subpoena in issue that "The witness is entitled to be paid conduct money", and the accompanying warning (Transcript, pp. 1247, 1254). The witness was apparently in fact paid conduct money. Exercising my discretion, I ruled that as "Mr. Merer is a party to the proceedings and has been in attendance throughout ..." the defect in form was not fatal to the subpoena (Transcript, p. 1255). Another fresh subpoena could have been issued in any event, if the original subpoena was held to be fatally defective in form.

Mr. Jupp was prepared to produce the documents referred to in the Merer subpoena, with one exception, if six conditions he stipulated (Transcript, pp. 1386, 1387, 1400, 1401) were fulfilled; however, these conditions were unacceptable to both the Board (Transcript, pp, 1401, 1405) and to counsel for the Commission and the Complainant (Transcript, pp, 1402, 1403, 1404).

A thoughtful interim decision by Professor M.R. Gorsky, as a Board of Inquiry, in Guru v. McMaster University, supra, turned on a similar, but distinguishable, situation. Professor Gorsky quashed a subpoena duces tecum, for the reason that, as conceded by counsel for the Commission who had requested the subpoena, it was being used simply for discovery purposes (pp. 1,3). Professor Gorsky noted there was no common law right of discovery (p. 1).

Professor Sidney N. Lederman, sitting as a Board of Inquiry, has given a decision to the same effect. He equated the subpoena contemplated by s. 12(1)(b) of the Statutory Powers Procedure Act with a subpoena duces tecum, and I think this is a valid comparison. See Nembhard and Manradge v. Caneurop Manufacturing Limited, March 11, 1976, at pp. 22, 23.

Section 12(1) of the Statutory Powers Procedure Act reads:

> "(1) A tribunal may require any person, including a party by summons,
>
> (a) to give evidence on oath or affirmation at a hearing; and
>
> (b) to produce in evidence at a hearing documents and things specified by the tribunal,"

I agree with the decisions in Guru and Caneurop that under s. 12(1)(b) of the Statutory Powers Procedures Act, production of a document is to be for the purpose of producing it in evidence at the hearing and not simply for the purpose of obtaining discovery. However, as I have stated above, the Merer subpoena meets the standard of s. 12(1)(b) as it was for the purpose of producing documents as evidence, and not for discovery purposes. Hence, the subpoena is valid, being authorized by s. 12(1)(b) of the Statutory Powers Procedures Act.

I might add that although it was not necessary, Mr. Millward committed himself to the position that the Commission and Complainant would not have further witnesses (other than possibly in reply evidence) after the documents sought by the Merer subpoena were introduced in evidence, and the Commission's and Complainant's case was closed subject to the introduction of such documents into evidence (Transcript, pp. 1484, 1485). This position lends further support to the position of Mr. Millward that the Merer subpoena is not being employed as a discovery device.

I have noted as well, as cited in the decision of Professor Gorsky in the Guru decision (p. 4), that I may have the discretion to set aside the subpoena as a

> "subpoena duces tecum or an application in the nature of such a subpoena ... may be set aside or refused where it appears that the request is irrelevant, fishing, speculative or oppressive."

The Supreme Court Practice, 1979, Part I, at p. 606 referring to Senior v. Holdsworth, ex p. Independent Television News Ltd., [1976] Q.B. 23 at p. 35, per Lord Denning:

> "... the court should exercise this power only where it is likely that the [document] will have a direct and important place in the determination of the issues before the court. The mere assertion that the [document] may have some bearing will not be enough. If the judge considers that the request is ... fishing or speculative ... the judge should refuse it. (emphasis added).

However, I do not think that I should exercise my discretion to set aside the Merer subpoena, as I do not think the subpoena is "irrelevant, fishing, speculative or oppressive". There has already been introduced into evidence some 68 Exhibits, and some of these exhibits, as well as much of the vive voce testimony, relate to complex documents dealt with in the course of the Complainant's employment with the corporate Respondent and how the Complainant performed his duties of employment. It may well be that the documents sought by the Merer subpoena may be relevant to the testimony given and exhibits already filed, as well as the testimony of the Respondents yet to come.

Therefore, with respect to the Merer subpoena, it is my view that it is valid and that Mr. Merer is required to produce the documents into evidence, subject to certain requirements, specifically, that the documents are relevant and are not privileged. I will make a decision on the points of relevance and privilege on a document by document basis, if counsel cannot agree in advance. Section 15 of the Statutory Powers Procedure Act

is the legislative provision governing admissability in evidence at a hearing. Finally, Mr. Merer's counsel suggested that some of these documents should only be received as evidence in camera, and if counsel can not agree on what documents fall into this category, I will rule on this point also on a document by document basis.

Finally, my decision in the instant situation in respect of the Merer subpoena is consistent with my decision in Ahluwalia v. Metropolitan Toronto Board of Police Commissioners, which decision was upheld by the Divisional Court, (1980), 27 O.R. (2nd), 48 (Div. Ct.).

Labrosse, J. stated, at p. 49:

> "The second application is for an order quashing the ruling of the board of inquiry whereby the respondent Dickson was required to produce the personnel records of certain members of the Metropolitan Toronto Police Force and whereby counsel for the board was granted an adjournment and the right of access to and of examination of such records before the inquiry proceeded."

He stated further at p. 53:

> "We find no error in the ruling of the board of inquiry in refusing to set aside the subpoena for the production of records. There is no material in the record to enable this Court to make any determination respecting the relevance of the documents. The board has already decided that the examination of the records will be held in camera in order to protect the identity of the constables involved. In so far as their admissibility, it will be for the board to determine at the time counsel seeks to introduce them into evidence, and if they are admissible, to determine the weight they should be given.
>
> Mr. Parker submitted that the board has ruled in advance that the records are admissible as evidence. If this is so, and the transcript is not clear on this point, then the board was in error, because in our view, the appropriate time to rule on their admissibility is as stated above.

> Finally, in respect of the adjournment granted to counsel for the board, to permit him to examine the records, this was purely a matter of discretion. The board has exclusive jurisdiction over the conduct of its procedure and the exercise of its discretion to grant the adjournment is not reviewable by this Court, provided that the board has not violated recognized principles of fairness or conducted itself in such a way as to amount to a refusal of jurisdiction, which is not the case here. In any event, the transcript indicates that the adjournment was granted for two reasons: to permit counsel for the Board to examine the records and to permit counsel for the applicants to bring these applications."

Commission Counsel in that case was not seeking to utilize the subpoena duces tecum as a discovery device. That is, subject to the test of relevancy, personnel records were admissable, and an adjournment at any point of time within the discretion of the Board of Inquiry could be given for the purpose of allowing Commission counsel to examine such records introduced, or to be introduced, in evidence.

Before leaving the Merer subpoena, I think it useful, as an aside, to mention briefly that the person who is subject to a subpoena duces tecum need not be a witness beyond the mere production of the documents specified in the subpoena.

> "... [T]he summoning party is entitled to require the witness to produce the document, without putting him on the witness stand to speak as to his general knowledge of the case ... the document, unless it is one which "proves itself" on production, will have to be proved by some other witness". (2 Holmested and Gale, The Judicature Act, 1508).

Wigmore, On Evidence, at p. 126 is to the same effect.

> "The ordinary clause "ad testificandum" is, however, at the same time commonly preserved, and the question is thus raised whether the summoning party can require the production of a document without also putting the producer on the stand to speak as to his general knowledge of the case. It would seem that the two forms of testimony are separable and that the summoning party may therefore elect to have the one without

the other. This is the generally accepted opinion. This result harmonizes with the solution of the analogous question (§1894 supra) whether the calling of the witness merely to produce a document makes him the party's own so as to subject him to cross-examination by the opponent."

Gaspar and Stratton Subpoenae

The Stratton and Gaspar subpoenae are subpoenae ad testificandum with a directive to produce documents as well. In my view the officers should not be compelled to comply with these subpoenae, for the reason that the files of the Human Rights Commission, and the testimony of the officers as to the inquiry and conciliation stage, are privileged on one or more grounds.

First, the materials requested by such subpoenae have been prepared in consequence of the Complaint filed. The Commission's file was prepared with a view to conciliation following investigation and in contemplation of a Board of Inquiry if conciliation was not successful. As well, the role of Ms. Gaspar and Mr. Stratton has been through the inquiry and conciliation stage following the making of the complaints. Respondents were not seeking through the Stratton and Gaspar subpoenae documents or testimony pertaining to the Complainant's employment history, that is, documents that arose as part of the factual history from which the Complaints arise. Any such documents could have been obtained through the Complainant, and would be properly admissable as evidence, as they would pertain to the substantive issues before the Board of Inquiry [Transcript, p. 1427]. Ms. Gaspar and Mr. Stratton only have knowledge that is relevant as gained through the inquiry and conciliation stage. There was no suggestion they might have any relevant knowledge other than through their being Human Rights Commission employees. [Transcript, p. 1307].

Documents are privileged when they are prepared in contemplation of litigation. Such materials are privileged in law because a party to litigation should be able to assess, and determine his position without fear of disclosure, and material prepared in this regard is not really

relevant to the factual evidence culminating in the event which has given rise to litigation.

A second basis of privilege is that the objective of conciliation of the Code would be compromised, if discussions and knowledge gained in that process could be forced through a subpoena to be divulged at a subsequent Hearing. It is in the public interest that discussions as to conciliation and settlement of a complaint take place, and the Code requires the Commission's officers to "endeavour to effect a settlement" - s. 14(1). This possibility is maximized if the discussions in the conciliation stage are without prejudice, and it seems to me to be implicit to the Code at least as a general proposition, that such discussions are without prejudice, that is, a subpoena to compel a human rights officer to testify as to his or her knowledge of such discussions will be refused. Confidentiality is implicit to the conciliation process. One can conceive of exceptions, for example, if it is alleged that there is fraud or coercion in effectuating a settlement, but such is not, of course, suggested in the instant situation. The protected privilege of confidentiality is stated by Wigmore On Evidence, 3rd ed. (1940), vol. 8, para 2285 to rest upon the following requirements:

> "(1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation.

An example of the necessity for confidentiality is seen in University of Guelph v. Canadian Association of University Teachers et al 29 O.R. (2d) 312 at 316-17, where an arbitrator's decision to compel production of the university's file pertaining to the decision-making process relating to a professor's being denied promotion, was overturned upon review by the court.

Colleagues of the professor had given evaluations of the candidate to the university on the basis their views would be kept confidential.

In my opinion, the conciliation process pertaining to a human rights' complaint more than meets the standards for requiring confidentiality of discussions and documents pertaining thereto. I would quash the Gaspar and Stratton subpoenae.

Ms. Anne Molloy Subpoena

Apparently, Respondents' counsel have another subpoena ad testificandum directed to Ms. Anne Molloy, "an independent legal counsel retained by the Commission" (Respondents' written summary of submissions with respect to the motions as to the subpoenae). Although the record is not explicit, it was not asserted that Ms. Molloy might possibly have any knowledge at all about the issues before this Board of Inquiry other than what she obtained through a solicitor-client relationship with the Commission.

Cross, On Evidence, 5th ed., 1979, at p. 284 states:

> "In order that communications between the client or his legal adviser and third parties should be privileged, there must be a definite prospect of litigation in contemplation by the client, and not a mere vague anticipation of it, but it is not necessary that a cause of action should have arisen, nor is it essential that the third party should anticipate litigation. The communication must have been made, or the document brought into existence, for the purpose of enabling the legal adviser to advise or act with regard to the litigation."

The modern Canadian position goes further, as stated in C.E.D. (Ont. 3rd), at 57-454:

> "§873 Professional communications between solicitor and client of a confidential character which take place for the purpose of getting legal advice are privileged. The law as to privilege for communications between a client

and his solicitor has been gradually developed. It is not now necessary, as it formerly was, for the purpose of obtaining protection, that the communications should be made either during or relating to an actual, or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity."

In my view, any testimony Ms. Molloy might be asked to give is privileged as being professional communications between solicitor and client of a confidential character which took place for the purpose of obtaining legal advice. Confidentiality is implicit to such a process. Therefore, I would quash the Molloy subpoena.

Dated at Toronto the 22nd day of May, 1981,

Peter A. Cumming,
Board of Inquiry